VIRGINIA
LAW REVIEW

VOL. VI. JANUARY, 1919 No. 4

SALES OF GOODS ON C. I. F. TERMS.

THE contract of sale, C. I. F. the point of destination, while long and widely used in international commerce, is practically a stranger to most American lawyers. In Thames & Mersey Marine Ins. Co. *v.* United States,[1] Mr. Justice Hughes spoke of it as "the familiar C. I. F. contract," but as a matter of fact only a very small fraction of the profession in this country has hitherto had more than a nodding acquaintance with it at most. Scarcely any of our text-books on sales so much as mention it, and a search of the digests for American decisions on the subject yields a surprisingly scanty return. With the rapid growth of our overseas trade, however, it will behoove the profession to become better acquainted with this form of contract.

In earlier times the initials were usually written "C. F. & I.", but nowadays the order is invariably "C. I. F." and in trade circles they are commonly compressed into word form—"Cif." These initials are an abbreviation of the words "cost, insurance, freight," and signify that the price quoted includes the cost of the goods, the cost of insuring them during the transportation, and the freight charges to the point of destination. The seller agrees to deliver the goods to a carrier, to arrange for their transportation, to take the customary insurance on them for the buyer's benefit against the risks of the voyage, to prepay or credit the freight, and to tender the shipping documents to the buyer. The buyer agrees to pay the purchase price upon presentation of the shipping documents, the demand being usually

[1] 237 U. S. 19, 26.

made in the form of a sight draft with shipping documents attached.

Roughly speaking, therefore, the contract is the same as a sale F. O. B. the point of shipment, cash against documents, with the added incidents that the price includes the freight and insurance and the seller undertakes to arrange for these matters. The advantages of this form of contract in transactions requiring carriage by sea between widely separated ports are obvious. It relieves the buyer of the difficulty of arranging for insurance and transportation from a distant port, and enables him to know in advance exactly how much he will have to pay for his goods, and to resell them before their arrival.

The C. I. F. contract has long been familiar to the English courts. As early as 1862 it was held in Trequelles *v.* Sewell,[2] that, under such a contract, the seller did not undertake to deliver at the point of destination and that the goods were at the buyer's risk from the time of shipment. In Ireland *v.* Livingston,[3] Mr. Justice Blackburn lucidly stated the legal incidents of the contract as follows:

> "'The terms at a price, 'to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents,' are very usual and are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance, and the freight, as the case may be), and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charter party, bill of lading, and policy of insurance. Should the ship arrive with the goods on board he will have to pay the freight, which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover

[2] 7 H. & N. 573.

[3] L. R. [1871] 5 H. L. 395.

it from the shipowner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way."

In Crozier, Stevens & Co. *v.* Auerbach,[4] the Court of Appeals said it was admitted "that the property in the goods passes to the purchaser at the moment of delivery on board and that they are at the purchaser's risk throughout the voyage."

The leading modern authority on the subject is the case of Biddell Bros. *v.* Clement Horst Co., in which the principal question was whether, under a C. I. F. contract which did not expressly provide that the buyer should pay upon tender of the shipping documents, the buyer was entitled to await the arrival of the goods before making payment. In the King's Bench it was held the buyer had no such right, Hamilton, J., saying:[5]

"The meaning of a contract of sale upon cost, freight, and insurance terms is so well settled that it is unnecessary to refer to authorities upon the subject. A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated in the contract; thirdly to arrange for an insurance upon the terms current in the trade, which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn, J., in Ireland *v.* Livingston, L. R., 5 H. L., at p. 406, or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice, and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price."

This judgment was reversed by the Court of Appeals,[6] Lord

[4] L. R. [1908] 2 K. B. 161.
[5] L. R. [1911] 1 K. B. 214, 220. [6] L. R. [1911] 1 K. B. 934.

Justice Kennedy, dissenting, but on appeal to the House of Lords the Court of Appeal was in turn reversed on the authority of Lord Justice Kennedy's dissenting opinion, which was referred to by the Lord Chancellor as a "remarkable" and "illuminating" exposition of the law governing C. I. F. contracts. In the course of this dissenting opinion Lord Justice Kennedy said:

> "At the port of shipment—in this case San Francisco—the vendor ships the goods intended for the purchaser under the contract. Under the Sales of Goods Act, 1893, s. 18, by such shipment the goods are appropriated by the vendor to the fulfillment of the contract, and by virtue of s. 32 the delivery of the goods to the carrier—whether named by the purchaser or not—for the purpose of transmission to the purchaser is prima facie to be deemed to be a delivery of the goods to the purchaser. Two further legal results arise out of the shipment. The goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c. i. f. contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use, if the goods should be lost in transit; and the property in the goods has passed to the purchaser either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favor of the vendor or his agent or representative. See the judgments of Bramwell, L. J. and Cotton, L. J. in Mirabita *v.* Imperial Ottoman Bank (1878) 3 Ex. D. 164. It passes unconditionally where the bill of lading is made out in favor of the purchaser or his agent or representative, as consignee."

Delivering the opinion of the House of Lords, the Lord Chancellor said:[7]

> "The buyer is to pay cash. But when is he to pay cash? The contract does not say. The buyer says that he is to pay cash against physical delivery and acceptance of the goods when they have come to England. Now s. 28 of the Sales of Goods Act says in effect that payment is to be against delivery. Accordingly we have supplied by the general

[7] L. R. [1912] A. C. 18, 22.

law an answer to the question when this cash is to be paid. But when is there delivery of goods which are on board ship? That may be quite a different thing from delivery of goods on shore. The answer is that delivery of the bill of lading when the goods are at sea can be treated as delivery of the goods themselves, this law being so old that I think it is quite unnecessary to refer to authority for it.

"Now in this contract there is no time fixed in which the seller is entitled to tender the bill of lading. He therefore may do so at any reasonable time; and it is wrong to say that he must defer the tender of the bill of lading until the ship has arrived; and it is still more wrong to say that he must defer the tender of the bill of lading until after the goods have been landed, inspected, and accepted."

In C. Groom, Ltd. *v.* Barber,[8] Atkin, J., said that, under a C. I. F. contract:

"In my opinion the result is that the contract of the seller is performed by delivering to the buyer within a reasonable time from the agreed date of shipment the documents, ordinarily the bill of lading, the invoice, and the policy of insurance, which will entitle the buyer to obtain on arrival of the ship delivery of goods shipped in accordance with the contract, or in case of loss will entitle him to recover on the policy the value of the goods if lost by a peril agreed in the contract to be covered, and in any case will give him rightful claim against the ship in respect of any misdelivery or wrongful treatment of the goods. It therefore becomes immaterial whether before the date of the tender of the documents the property in the goods was the seller's or buyer's or some third person's."

In Duncan, Fox & Co. *v.* Schrempft & Bonke,[9] Lord Justice Phillimore said:

"Under a C. I. F. contract the seller fulfills his obligations when he has shipped the goods as described therein and has tendered the shipping documents to the purchasers."

In Arnhold Karberg & Co. *v.* Blythe, Green, Jourdain & Co., Lord Justice Bankes said:[10]

"The condition of the goods at the time of the tender of the

[8] L. R. [1915] 1 K. B. 316, 324.
[9] L. R. [1915] 3 K. B. 355, 364.
[10] L. R. [1916] 1 K. B. 495, 510.

> shipping documents is not material, nor is the value of the documents at the time of tender material. In all such matters the risk is on the buyer. He may be obliged to pay for goods although they may be at the bottom of the sea, or although through some unforeseen circumstance they may never arrive, or although they may have been lost owing to some cause not covered by the agreed form of policy."

In Law & Bonar, Ltd. *v.* British American Tobacco Co., Rowlatt, J., said: [11]

> "The tender of documents representing goods duly shipped in accordance with the contract and insured against marine risks as required by the contract was not vitiated by the fact that the goods had actually been lost."

Among the very few reported American cases in which C. I. F. contracts have been under consideration, practically the only one that throws much light on the subject is Mee *v.* McNider.[12] In that case the defendant contracted for certain cocoa at an agreed price "C. F. & I. by steamer to N. Y." On arrival defendant refused to accept or pay for the cocoa on the ground that it had been damaged by water during the voyage. Writing for the court, Judge Danforth said:

> "On the part of the vendor the shipment by steamer was an effectual appropriation of the cocoa to the buyer and at that moment the agreement on the vendor's part was executed. The plain obligation of the purchaser, as defined by the written contract, then attached, and he was bound to accept and pay for the cargo at the price named and in the manner specified. It necessarily follows that injury to the cocoa during the voyage was no excuse for non-performance * * *."

With the outbreak of the World War and the consequent great expansion of our foreign trade the C. I. F. contract began enlarging its circle of acquaintances among American merchants and attorneys, and at the present time C. I. F. prices are freely quoted in our various trade journals. Also considerable litigation involving such contracts has commenced to find its

[11] L. R. [1916] 2 K. B. 605, 608. [12] 109 N. Y. 500, 17 N. E. 424.

way into our courts, although comparatively few cases have as yet reached the reported stage. Two of these, dealing with the measure of damages for breach of a C. I. F. contract, are of some interest.

In Staackman v. Cary,[13] which was an action against the buyer for breach of a contract to ship from Chicago "C. I. F. Antwerp," it was held that the proper basis for measuring damages was the market price at Antwerp. This decision would seem to be wrong, for it is well settled—by the English authorities, at any rate—that under such contracts the place of shipment is the place of delivery.[14]

In Setton *v.* Eberle-Albrecht Flour Co.,[15] the Circuit Court of Appeals, Eighth Circuit, reached the correct conclusion. There the seller was sued for non-performance of a sale contract calling for shipment from St. Louis, C. I. F., Alexandria, Egypt. The court held that the market price at St. Louis was the proper basis for measuring the damages.

At this writing appeals are pending in New York, Massachusetts and Pennsylvania which will decide a number of interesting questions with regard to C. I. F. contracts. All of these cases arose out of the sinking on October 6, 1916, by the German submarine "U-53" of the S. S. "Stephano" while en route from St. Johns, N. F., to New York City.

Down to the time when the "U-53" made its appearance at Newport there had been little apprehension of submarine operations along our Atlantic seaboard, and, consequently, it had not been customary to insure coastwise shipments against war risks. On the "Stephano" were various C. I. F. shipments destined for New York, Philadelphia and Boston, and as they were insured against marine risks only, there was a total loss to be borne by one party or the other. The buyers generally refused to accept the shipping documents and the sellers brought actions for the agreed purchase price, claiming that they had fully performed their obligation to insure the goods. In the Massachusetts and Pennsylvania cases and one of the New York cases

[13] 197 Ill. App. 601.
[14] Crozier, Stevens & Co. *v.* Auerbach, *supra.*
[15] 258 Fed. 905.

the plaintiffs recovered judgments. In another New York case the jury returned a verdict for the defendants.

The principal questions involved in all these actions were: (1) What insurance did the sellers agree to procure? (2) Under the uniform Sales of Goods Act does the property in goods shipped C. I. F. pass to the buyer at the port of shipment? (3) Does the fact that the seller takes the bill of lading to his own order to secure payment of the purchase price prevent the property from passing to the buyer at the port of shipment?

The procuring of proper insurance on the goods is an essential part of the seller's contract, and even though the goods have arrived at their destination in good condition, the buyer is under no obligation to accept or pay for them unless the seller tenders him an insurance policy conforming to the terms of the contract.[16] In the absence of any special agreement to the contrary, the seller's duty to insure is fully performed by obtaining insurance "on the terms current in the trade." [17]

In Weis & Co., Ltd. *v.* Credit Colonial,[18] the buyers refused to take up the documents because the sellers had procured no war risk insurance and the ship had been captured by the Germans. In the opinion, Bailhache, J., said:

> "The real origin of the objection by the buyers to the tender was that the policy of insurance which the sellers offered contained the usual f. c. and s. [free from capture and seizure] clause, and it therefore gave the buyers no opportunity of recovering the insurance money from the underwriters, and they were not in the least likely to obtain delivery of the oil. But it appears to me that those matters do not help the buyers. Although what happened was most unfortunate for them, it gives them no right to decline to pay. The Glenearn sailed before the war broke

[16] Landauer & Co. *v.* Craven & Speeding Bros., L. R. [1912] 2 K. B. 94; Orient Co., Ltd. *v.* Brekke & Howlid, L. R. [1913] 1 K. B. 531; Manbre Saccharine Co., Ltd. *v.* Corn Products Co., L. R. [1919] 1 K. B. 198.

[17] C. Groom, Ltd. *v.* Barber, *supra;* Weis & Co., Ltd. *v.* Credit Colonial, L. R. [1916] 1 K. B. 346; Law & Bonar, Ltd. *v.* British American Tobacco Co., *supra.*

[18] *Supra.*

> out, and it was therefore obviously sufficient for the sellers to procure a policy containing the f. c. and s. clause. If the buyers desired protection against war risks it was open to them to take out a war risk policy. * * * The mere fact that the goods had in the meantime been seized by the Germans did not release them from their liability."

It is of course a question of fact for the jury to decide whether the insurance obtained was "on the terms current in the trade"—or, in other words, was that customarily taken out on such shipments at that time. But sometimes a question of law also arises in this connection, namely: What custom shall govern—that of the place where the contract was made or that of the place where the goods were shipped? It would seem that the latter custom should control, but a discussion of that point would lead us too far afield.

With regard to the passing of the property in the goods, there is not much reason for believing that our uniform Sales of Goods Act establishes a rule different from that laid down in the English cases—at any rate, when the bill of lading is taken to the buyer's order. That Act, after expressly providing that the intention of the parties shall determine the time at which the property is to pass to the buyer, (Sec. 18), lays down certain rules which shall govern "unless a different intention appears." One of these rules is as follows, (Sec. 19, Rule 5):

> "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or *to pay the freight or cost of transportation to the buyer or to a particular place,* the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

This rule is not found in the English Sales Act and, consequently, it is arguable that it requires a different conclusion from that reached by the English courts. However, it would seem to be a sufficient answer to point out that by contracting on C. I. F. terms the parties clearly express "a different intention." Moreover, there would be no object in including a provision requiring the seller to insure if it was the intention of the parties that the property should remain in the seller during the voyage.

But where the seller takes the bill of lading to his own order to secure payment of the purchase price a more difficult question is presented, owing to the fact that the uniform Sales Act apears to make a distinction between the passing of the risk of loss and the passing of the property. The Act (Sec. 20, div. 2) provides:

> "Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby *reserves the property* in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract."

Apparently the purpose of the last sentence quoted (which is not found in the English act) was to link up with a later section relating solely to "risk of loss" which contains this provision, (Sec. 22, div. a):

> "Where delivery of goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery."

Nowhere is there an equivalent provision regarding the passing of the property, and, if the language of the Act is to be taken literally, it will follow that, notwithstanding the risk of loss is on the buyer, yet an unpaid seller who has taken the bill of lading to his own order cannot sue for the purchase price, because the Act (Sec. 63) provides that (except in cases where the goods cannot "readily be resold for a reasonable price") an action for the purchase price can be maintained only if "the property in the goods has passed to the buyer." In this connection it must be borne in mind that the Act (Sec. 76) defines "property" as "the general property in goods, not merely a special property."

When this difficulty was brought to the attention of Professor Williston he wrote:

> "I think the seller should recover the price if he so desires but I confess that the Sales Act does not make the matter clear. The argument in favor of allowing the price is based on the provisions in regard to risk of loss, but, on the other hand, the express provisions in regard to recovery of the price seem to point in the other direction."

In all probability the courts will hold that, under a C. I. F. contract, the general property passes to the buyer upon delivery to the carrier notwithstanding the bill of lading is to the seller's order. That was the view taken by the Appellate Term of the New York Supreme Court in Glanzer *v.* Ormsby Co.,[19] which case, however, did not involve a C. I. F. contract. It may fairly be argued that an intent to change the long recognized legal incidents of the C. I. F. contract should not be inferred, and that, since the Sales Act nowhere contains any specific reference to such contracts, they should be regarded as "not provided for" within the meaning of Section 73, which provides that "in any case not provided for in this article, the rules of law and equity, including the law merchant, * * * shall continue to apply to contracts to sell and to sales of goods."

Edward A. Craighill, Jr.

NEW YORK CITY.

[19] 100 Misc. Rep. 476, 165 N. Y. Supp. 1006.